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CASE & COMMENT

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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS
INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED
LEGAL NEWS NOTES AND FACETIÆ

VOL. 4 OCTOBER, 1897. No. 5

CASE AND COMMENT

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THE LAWYERS' CO-OPERATIVE PUB. CO.,
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William J. Wallace.*

The distinguished success on the bench of the United States circuit court that has been won by William J. Wallace in the second circuit is everywhere recognized.

The mere outline of the life of Judge Wallace can be briefly stated because of his continuous career on the bench for so many years. He was born in Syracuse, N. Y., and on reaching maturity entered on the practice of law in his native city. He continued in practice there until 1874 and was mayor of Syracuse 1873–4. He was appointed by President Grant, in 1874, to be judge of the district court of the United States for the northern district of New York. After about eight years of service in this court, he was appointed by President Arthur, in 1882, to be circuit judge of the United States for the second circuit, as the successor of Judge Blatchford, who then became justice of the Supreme Court of the United States. Judge Wallace is now the nominee of the Republican party for chief judge of the court of appeals of the state of New York. The degree of LL.D. has been conferred on him by Hamilton College and also by Syracuse University.

*This is the first of a series of brief sketches, with portrait supplements, of the senior judges of the respective circuit courts of the United States.

The decisions which Judge Wallace has rendered now reach a great number, and they are regarded by the bench and bar with peculiar respect. Few judges of the circuit court of the United States have been so widely known. The business of the second circuit of the United States circuit court, including New York, Vermont, and Connecticut, has been prodigiously large for many years. In recognition of this fact, Congress provided, about ten years ago, for an additional circuit judge in this circuit, and has, still later, added a third. During the years in which Judge Wallace was the sole circuit judge in this circuit the litigation in his court was, in respect to the magnitude of financial interests involved, probably unparalleled in any jurisdiction in the world.

The number and importance of the cases which Judge Wallace has decided, and the judicial learning and ability which they demonstrate, have given him undisputed rank among the eminent judges of the Federal courts.

Eligibility of Women to Office.

The advocates of equal political rights for women will find encouragement in the recent decision of the supreme court of Missouri in State, *ex rel.* Crow, *v.* Hostetter (Mo.) 37 L. R. A. —. This court held that a woman is eligible to election as county clerk, although the state Constitution and statutes use masculine pronouns when referring to such officers, where the Constitution has dropped the word "male" from the statement of qualifications for such officers, but retained it in the case of some higher officers. The decision was rendered by the first division of the supreme court, all the members of which concur in the opinion by Chief Justice Barclay. While the

decision is doubtless more liberal toward the rights of women than decisions of some other courts have been, it is to be noticed that one important element in the interpretation of the Constitution on the subject was the fact that the word "male" had been dropped from the constitutional provision respecting this office, but retained in reference to some other offices.

The court refers to the fact that the office is a ministerial one which admits of the use of a deputy, and that its duties "are not of such a nature as to be incompatible of discharge by a woman," and then says: "In view of the condition of the positive law of Missouri above described, we do not consider it necessary to enter into a discussion of the eligibility of women to office at common law or in other states of the Union."

The common law of the subject presents a paradox. The accepted common-law doctrine is against the eligibility of women and the common-law decisions are all in favor of it. In every reported case prior to the present generation in which a woman's right to hold a particular office was questioned the right was sustained. The theory that women are incompetent at common law to hold office must be based on the fact that they did not actually take office except in rare instances, and that these instances were usually treated by the judges and law writers as exceptional. But there is quite an array of cases in which the incumbents of offices were women, and their competency was invariably sustained.

A list of the offices that women have held in England includes quite a variety. Aside from the notable fact that some of the greatest rulers of the nation have been women, it appears from Campbell's Lives of the Lord Chancellors that Queen Eleanor was appointed lady keeper of the great seal, and performed the judicial as well as the ministerial duties of the office, so that Lord Campbell says: "I am thus bound to include her in the list of the chancellors and keepers of the great seal." The Countess of Pembroke, Dorset, and Montgomery sat with other judges on the bench in the exercise of the duties of her office of hereditary sheriff. Lady Suffolk is shown in the year books (8 Edw. IV. 1) to have rendered an award as arbitrator, and it does not appear that any question was raised as to her competency or that this was deemed to be unusual. Other offices held by women are described in various cases as those of keeper of prison, keeper of workhouse, governor of workhouse, custodian of castle, overseer of the poor, sexton of the parish, forester, commissioner of sewers, constable of England, marshal of England, great chamberlain of England, and marshal of the Court of King's Bench. Some of these offices were hereditary but not all of them, and sometimes the women who held them exercised their functions by deputy. It is also doubtless true that some of these offices were obscure, and were exercised, in the words of an English judge, "in a remote part of the country where nobody else could have been found who could exercise them." But the fact remains that in all this variety of offices that were held by women whenever a contest of the right of the woman to the office was made her right was sustained, although in some of the cases the judges based their decisions on the fact that the office was hereditary or its functions exercisable by deputy, and in general they seem to regard the holding of office by women as exceptional. From these facts has come the curious result that all the common-law decisions on contests of the right of women to office were in favor of their right, while the accepted common-law doctrine is against their right.

Some actual decisions against the rights of women have been rendered in recent years. But the recent authorities are not all against them, as appears in a note to the Missouri case above referred to. It may be fairly said to be the prevailing doctrine, both in England and America, that women are ineligible to any important office except when made so by enactment. Such an enactment is to be found in the Missouri case, in broadening the provision as to qualifications by dropping the word "male." Some of the statutes expressly provide that words of the masculine gender shall include women. It is unquestionably the tendency both of the statutes and the decisions to extend the rights of women in this respect.

Transplanting Children.

A contract with a children's home society by which a mother surrenders her child, consenting to its adoption without notice to her by any person to whom the society might give it, and agreeing that she would not visit or seek to find the child, is held void in the recent case of *Re* Sleep, 6 Pa. Dist. Rep. 164, by the court of common pleas in Allegheny county, Pa. The court declares that such a contract is contrary to public policy, tending directly to encourage illegitimacy, ignoring the mother's affection for the child and the respect which the child should have for the parent, and that

it is contrary to morality, humanity, and Christianity.

The chief objection of the court to this contract seems to be to the provision that the mother shall not visit the child or know where it is. But the court makes reference also to the fact that the society was organized in another state and had no responsible local head or management.

The utter estrangement of children and parent which the court so severely condemns has been deemed by many of those who procure the adoption of children to be a necessary condition if the foster parents insist upon it. Harsh as the requirement seems, it is often an inexorable condition precedent to the adoption. The very necessity of finding a home for the child is often due to such degradation of the natural parents that their visits to the child would be damaging as well as annoying, and the probability of such visits would effectually bar every attempt to get the child into any desirable home.

Irresponsible parties ought not to be allowed to exercise unlimited power in the disposal of children even when they have obtained a contract from the parents completely surrendering the child to them. In fact, a contract to devest a parent of all his parental rights and responsibilities is clearly shown to be void as against public policy by the authorities in a note to Enders *v.* Enders (Pa.) 27 L. R. A. 56, although such contracts are sometimes made valid by estoppel or by statute. But there should be responsible and authorized agencies to secure homes for unfortunate children with power to give assurance that the natural parents shall not thereafter visit them when this is necessary to the welfare of the children and to secure their adoption into good homes.

The state itself is still guilty of criminally neglecting thousands of children who are growing up to speak of it with curses and to wage continual war upon society. The policy of transplanting homeless and neglected children into the homes of good citizens is beyond comparison the best remedy for their evil condition. All must agree that natural affection should not be violated beyond the stern necessities of the case. But when parents are so vicious or degraded as to be unfit for the custody of their children, their feelings are of far less importance than the welfare of the children themselves. Only maudlin sentiment would wish to spare their feelings at the terrible cost of ruin to the children. Yet much of this sentimentality, as well as much sluggishness of the public, must be overcome before the state will cease its unutterable folly of neglecting needy children.

Action for Prenatal Injury.

The first action ever sustained for injury received by the plaintiff before birth is probably that of Allaire *v.* St. Luke's Hospital in the superior court of Cook county, Illinois, reported in 30 Chic. L. N. 44. This was an action by a boy eleven years old for an injury received before birth by an accident to his mother while she was on an elevator in a hospital which had contracted to take care of her during her expected confinement. The case of Dietrich *v.* Northampton, 138 Mass. 14, held that an action could not be maintained for such an injury by the administrator of a child prematurely born before it was possible to sustain independent life for more than a few minutes, in consequence of its mother's fall on a defective highway. So, in Walker *v.* Great Northern R. Co. 28 L. R. (Ir.) 69, a child injured before birth by an accident to his mother while she was a railway passenger was denied any right of action against the carrier. But these cases are distinguished by Judge Chetlain in the Chicago case, and the action maintained on the ground that the hospital had received the mother with full knowledge of the child's existence, and was required by its contract to care for the child as well as the mother. It may be noticed also that this case differs from the Massachusetts case in the fact that the child lived and was itself the plaintiff.

There are two kinds of cases in which Judge Chetlain thinks the existence of an unborn child, which equity long ago recognized in cases of property rights, should be recognized for the purpose of sustaining an action for prenatal injuries. One includes cases like that in question, in which there is a breach of duty to the child itself arising out of contract, and from the relative situation and circumstances of the parties. The other includes cases of wilful injury to the mother with intent to injure the child. To this extent it seems entirely reasonable and safe to extend the application of the principle declared by Lord Coke in respect to an unborn child, that "the law in many cases hath consideration of him in respect of the apparent expectation of his birth."

Finish Removable.

The most extreme case yet decided in favor of the right to remove fixtures from a building

is probably that of German Savings & L. Soc. v. Weber (Wash.) — L. R. A. —, in which it is held that a contractor who put into a mortgaged building what is called the standing finish, consisting of window and door sashes, jambs and trimmings, wainscoting, baseboards, mantel piece and doors, including glass and hardware, under a contract with the mortgagor by which he retained title until he received payment, had a right to take these articles out of the building in case of default in payment. But here the contractor had attached all these things by screws so that they could be easily taken off by removing the screws. While this is probably the most striking case on the subject, it is quite within the principle laid down in a considerable number of cases to the effect that the agreement of the parties may prevent a chattel from becoming real property when it is attached thereto. The authorities on this subject, including the effect of such an agreement as to prior mortgagees, are reviewed in a note to Muir & McDonald v. Jones (Or.) 19 L. R. A. 441. Most of the authorities hold that even as against prior mortgagees a definite agreement may be sufficient to prevent articles which are attached to buildings in a way that permits of their removal without injury from becoming a part of the realty. The Washington case says: "We are satisfied that the trend of modern authority is to the effect that the intention of the contracting parties should be allowed to control, and that intention will control, even so far as the rights of the former mortgagee is concerned, subject to the limitation that the fixtures which outside of the stipulation would have, under the law, been regarded as real estate can be removed only when such removal can be effected without injury to the real estate or to the building to which they are attached."

The Naturalized Mexican Again.

A lawyer moves to have the article in the August "Case and Comment," respecting the naturalization of a Mexican, state more particularly whether Judge Maxey held that the Mexican could or that he could not be naturalized. The judge's words therein quoted do not seem doubtful in meaning. They indicate plainly what he in fact decided, that the Mexican had a right to be naturalized.

Stopping Payment of Checks.

The right of a depositor to prohibit payment of a check out of funds afterwards deposited by him is upheld in Gage Hotel Co. v. Union Nat. Bank, 69 Ill. App. 681, although in Illinois a check given for value is regarded as a transfer of title to so much of an existing deposit as it calls for. In this case the depositor had not funds enough in the bank to pay the check at the time when it was given, but did have enough to pay it when it was presented. But as he had in the meantime prohibited payment of the check, the refusal of the bank to pay it was held proper. As his deposit was less than the amount of the check when this was made, it did not, as it would otherwise have done in that state, operate as an assignment or transfer of the bank account up to the amount of the check; and as it was entirely optional with him whether or not he should make any subsequent deposits, and optional with the bank whether or not it would receive them, the court considered them subject to his express orders against applying them on that check. The court says this question of law "is one of much interest and of much collateral importance." But the conclusion as to the subsequent deposits is in harmony with the general current of authorities shown in the note to Canterbury v. Bank of Sparta (Wis.) 30 L. R. A. 845, holding that the drawer of a check has a right to prevent its payment.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 36, Parts 5 and 6.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

Among the New Decisions.

Abortion.

Voluntary submission to treatment for the purpose of an abortion is held, in Goldnamer v. O'Brien (Ky.) 36 L. R. A. 715, to preclude any right of action against other persons for inducing and aiding the attempt. This is based on the general rule that the suit of a wrongdoer will be rejected when seeking redress for another's participation in the wrong.

Banks.

A fictitious credit given by a bank to a nominal depositor by entering a credit in his favor and immediately canceling it by another entry showing that a check was drawn for the full amount of the credit, but when the passbook of the depositor showed the credit only, is held, in James v. Crosthwait (Ga.) 36 L. R. A. 631, to make the banker liable to a person who sustained a loss by relying on the apparent credit, where he inquired of the banker as to it and was induced to believe that the entry in the passbook represented a real credit.

A cashier's check drawn by a banker upon himself "to the order of" another person is held, in Henry v. Allen (N. Y.) 36 L. R. A. 658, to constitute a negotiable instrument giving the rights of a bona fide holder to one who received it from an agent by mail in return for checks and drafts mailed to the agent for deposit.

Payments to a depositor during a run on a bank and after the cashier has persuaded some persons not to withdraw their deposits, but when the bank has assets sufficient so that its officers expect to continue the business and pay all debts, are held, in Stone v. Jenison (Mich.) 36 L. R. A. 675, to be lawfully made, and not to constitute an illegal preference to that depositor, although the run continues until the bank is forced to suspend.

A claim that a bank was bound to apply to the payment of a note which it held a deposit of the first indorser was denied in First Nat. Bank v. Peltz (Pa.) 36 L. R. A. 832, where the note was made for his accommodation so that he, and not the apparent maker, was, as between themselves, primarily liable upon it.

Bicycles.

A license tax on a bicycle used for pleasure is held, in Davis v. Petrinovich (Ala.) 36 L. R. A. 615, to be unauthorized by a charter provision for a "vehicle license" to be imposed on vehicles used in the "transportation of goods and merchandise."

Bills and Notes.

Presentment to all the makers of a note is held, in Benedict *v.* Schmieg (Wash.) 36 L. R. A. 703, to be necessary in order to hold an indorser, whether the note is joint in form or joint and several.

Carriers.

The right of a carrier receiving blasting powder for transportation to insist upon such limitation of common-law liability as it sees fit is sustained, in Cleveland Powder Works *v.* Atlantic & Pac. R. Co. (Cal.) 36 L. R. A. 648, on the ground that a common carrier is not obliged to receive and transport such dangerous articles.

For baggage left on a depot platform by a passenger who arrived at the place after 11 o'clock at night, when there were no conveyances running by which he could take it away, the carrier was held, in Kansas City, Ft. S. & M. R. Co. *v.* McGahey (Ark.) 36 L. R. A. 781, to be liable only as a warehouseman, and not as a common carrier, if the baggage was burned during the night.

The regulation of a carrier for collecting fares or tickets on a suburban train which prohibits passengers from going past the conductor into the part of the train where he has completed his collection of fares unless they satisfy him that they have already paid fare is held, in Faber *v.* Chicago Great Western R. Co. (Minn.) 36 L. R. A. 789, to be a reasonable one which the conductor was justified in enforcing, even as against a passenger who had no previous notice of it.

A reasonable charge for the detention of a carrier's cars beyond a reasonable time for loading or unloading is sustained in Kentucky Wagon Mfg. Co. *v.* Ohio & M. R. Co. (Ky.) 36 L. R. A. 850, and it is held that such charges may be imposed and enforced by a car-service association.

Case.

Notifying a party not to haul any more sand or gravel from certain premises, with a claim of ownership thereof, although this causes the breach of a contract between the other party and a third person to haul such sand or gravel, is held, in Glencoe Sand & G. Co. *v.* Hudson Bros. Com. Co. (Mo.) 36 L. R. A. 804, insufficient to render the party giving the notice liable for causing the breach of the contract.

Cemeteries.

Police power to prohibit the burial of the dead within the limits of the city is held, in *Re* Bohen (Cal.) 36 L. R. A. 618, not to sustain an ordinance prohibiting burials on lots not already purchased for that purpose, where the number of burials which the ordinance would still sanction would be greater than the number it would prohibit. It is also held that the owner of a lot cannot be restrained by ordinance from selling it for burial purposes where the use of lots in the vicinity for such purposes is not forbidden at the time.

Conflict of Laws.

The offspring of a bigamous marriage contracted in Illinois, where it is void, are held, in Leonard *v.* Braswell (Ky.) 36 L. R. A. 707, to be entitled to inherit lands in Kentucky, where the parents live, by virtue of the Kentucky statute legitimating the issue of the marriage.

The validity of a covenant made in North Carolina, where the parties are domiciled, by a married man, to surrender all his marital rights in his wife's land in Massachusetts in consideration of her release of dower in his land after she had been made a free trader, is held, in Polson *v.* Stewart (Mass.) 36 L. R. A. 771, to be governed by the law of North Carolina.

An agreement not to be performed within one year, though made in another state or country where it could be proved by parol evidence, is denied enforcement in Heaton *v.* Eldridge (Ohio) 36 L. R. A. 817, because the statute of that state allows an action on such contract only when it is in writing.

Constitutional Law.

A statute requiring the destruction of peach trees attacked by the yellows is held, in State *v.* Main (Conn.) 36 L. R. A. 623, to be within the discretion of the legislature as an exercise of the police power. The case also holds that the constitutionality of a statute is for the court to determine, and that it is the duty of the jury to accept the court's determination thereof even in a criminal case.

A statute including brothers and sisters in the list of those who are made liable for the support of a poor person whose pauperism is not the result of intemperance or other bad conduct is upheld in People, *ex rel.* Peoria

County, v. Hill (Ill.) 36 L. R. A. 634, although the statute transforms an imperfect moral duty into a statutory and legal liability.

Contempt.

The power of a notary public to commit a witness for contempt in refusing to be sworn or give a deposition is denied in *Re* Huron (Kan.) 36 L. R. A. 822, and a statute purporting to confer such power upon a notary is held void.

Contracts.

The rule that death terminates an executory contract when the peculiar skill or taste of the party who dies is essential to the completion of the contract is held in Cox v. Martin (Miss.) 36 L. R. A. 800, to be inapplicable to the case of a deed of trust covering crops to be grown and some other personal property, although it was necessary for the other party to make advances and complete the crop.

Corporations.

The right of the assignee of an insolvent bank to enforce the statutory liability of a shareholder is denied in Runner v. Dwiggins (Ind.) 36 L. R. A. 645, where the statute authorized him to collect the "rights and credits" of the assignor.

The fact that a lease of a corporation was void as against the state for want of capacity to make it is held, in Bath Gaslight Co. v. Claffy (N.Y.) 36 L. R. A. 664, insufficient as a defense against payment of rent by the lessee.

The right of a corporation to classify its stock and provide for a preference of one class over another in respect of both capital and dividends unless prohibited by law is sustained in Hamlin v. Toledo, St. L. & K. C. R. Co. (C. C. App. 6th C.) 36 L. R. A. 826, but certificates of "preferred, nonvoting, capital stock" declared to constitute a lien upon the property and net earnings of the company next after a first mortgage, with provision for interest payable only out of the net earnings and which is not to accumulate as a charge, are held to make the holders stockholders and not creditors, although they may have a preference over common stockholders in relation to both dividends and capital.

Cotenancy.

The right of a tenant in common who is also a lessee of his cotenant to compensation for improvements made by him, enhancing the value of the property, and made with the knowledge but without the consent of the cotenant, is denied in Cosgriff v. Foss (N. Y.) 36 L. R. A. 753, when their effect was not to protect or preserve the property but to aid the business of the tenant, and the increased income was not shared with the cotenant.

Counties.

A sale and conveyance of an academy by a county to a presbytery is held, in Jefferson County v. Grafton (Miss.) 36 L. R. A. 798, to be void unless made under legislative authority.

Creditors' Bills.

A creditors' bill taken to the clerk's office and indorsed as filed with the entry of a record thereof in the general docket but immediately withdrawn, is held, in Meridian Nat. Bank v. Hoyt (Miss.) 36 L. R. A. 796, not yet filed so as to give a lien on the holder's property.

Damages.

The measure of damages for failing to deliver a building to a tenant as agreed is held, in Jonas v. Noel (Tenn.) 36 L. R. A. 862, to be the difference between the rent provided for and the value or rental value, rather than the market value of the property, where the building was to be erected for the tenant and was of such unprecedented size that no one but the tenant would be likely to make it serviceable in his business.

Death.

Actions in the name of an administrator for the death of a person under the Ohio statutes are held, in Wolf v. Lake Erie & W. R. Co. (Ohio) 36 L. R. A. 812, to be for the exclusive benefit of the beneficiaries named in the statutes, and that the recovery should be for the amount of pecuniary injury sustained by each separate beneficiary who was not guilty of contributory negligence, although the verdict should be for a gross sum.

Drains.

The right to lay a private sewer in the streets of a city is held, in Stevens v. Muskegon (Mich.) 36 L. R. A. 777, to be one which the city could grant by contract, and when a sewer had been constructed in accordance therewith, it was held that a vested right was obtained to its use.

Easements.

The reservation in a grant of land for a highway which will necessitate a bridge over a ravine, of the right to attach a fence to the bridge, is held, in Agne v. Seitsinger (Iowa) 36 L. R. A. 701, to include the right to a cattle pass under the bridge where the grantor uses land on both sides of the road for pasturage, and the water supply was all on one side, and there was no apparent purpose in the reservation except to provide a cattle pass.

Evidence.

An order for the production in court for analysis by experts and physicians of a specimen of the urine of the plaintiff who has testified that he is suffering from albumen and sugar in the urine as the result of an injury, is held proper, in Cleveland, C. C. & St. L. R. Co. v. Huddleston (Ind.) 36 L. R. A. 681,—especially when he has voluntarily produced a specimen for his own counsel which has been analyzed by physicians selected by them and proof thereof offered in court.

Memoranda made at the time of the sale of tickets at the office of a railroad company, although not books of account, are held, in State v. Brady (Iowa) 36 L. R. A. 693, to be admissible in evidence when properly authenticated for the purpose of showing when and what tickets were sold.

As the law presumes sanity, it is held, in State v. Scott (La.) 36 L. R. A. 721, that an accused person who urges his insanity as a defense has the burden of proving it.

A judgment annulling foreclosure proceedings in an action commenced after a loss of insured property by fire is held, in Tierney v. Phœnix Ins. Co. (N. D.) 36 L. R. A. 760, to be inadmissible against an insurance company which was not a party to the action annulling the judgment, and which had no notice thereof for the purpose of defeating the effect of the foreclosure as a defense to a claim for insurance by the mortgagor, although the insurer had proved the foreclosure to defeat the insurance.

Executors and Administrators.

A sale by an administrator under decree of the orphans' court to pay a debt which at the time of the proceedings was barred by limitation is held, in Smith v. Wildman (Pa.) 36 L. R. A. 834, to be void for lack of jurisdiction, because the existence of the debt was the basis of the jurisdiction.

Game Laws.

Possession, during the close season, of game killed in another state is held, in Dickhaut v. State (Md.) 36 L. R. A. 765, not to be an offense under the Maryland statute making it unlawful to "shoot, or in any manner catch, kill, or have in possession" the game specified during the time prohibited.

Garnishment.

Concurrent jurisdiction in the courts of different states for the garnishment of a foreign corporation which is doing business in each state by agents is held, in Lancashire Ins. Co. v. Corbetts (Ill.) 36 L. R. A. 640, to exist, and it is held that the jurisdiction is not determined by the situs of the debt, but by the liability of the garnishee to be sued at the place.

Gas.

Escape of gas from a cracked elbow in a pipe which a gas company puts in, after repeated attempts to repair it and the assurance of its employee that it is all right, is held, in Richmond Gas Co. v. Baker (Ind.) 36 L. R. A. 683, to render the gas company liable for the resulting damages, where the persons were lulled by such assurances into a feeling of security, although able to smell the gas.

Husband and Wife.

The liability of a husband for slanderous words spoken by his wife is denied, in Lane v. Bryant (Ky.) 36 L. R. A. 709, under statutes which give the wife control and use of her property independent of the husband or his control.

Ice.

The right of the owner of the soil to cut and remove ice from a non-navigable stream is sustained in Gehlen v. Knorr (Iowa) 36 L. R. A. 697, even to any extent, for his own use, whether for storage or sale, if it does not thereby appreciably diminish the amount of water that can be used by the lower proprietor, and the construction of a dam to collect and retain the water for this purpose to a reasonable extent is upheld.

Insolvency.

Moneys collected by the trustees of an insolvent as the proceeds of sales made by him as commission merchant, and which are capable of identification, are held, in Drovers' & M. Nat. Bank v. Roller (Md.) 36 L. R. A. 767, to belong to the consignor, but general assets in the hands of the trustee are not chargeable with a lien in his favor.

Insurance.

In case of a reinsurance it was held, in Chalaron v. Insurance Co. of North America (La.) 36 L. R. A. 742, that the fact that the original insurer bore no part of the risk because only part of the intended cargo to be insured was placed on board did not avoid the reinsurance, although in obtaining it the original insurer had stated, "We carry our line."

Landlord and Tenant.

A landlord is not exonerated from responsibility for the safe condition of an elevator in a building a portion of which is leased where he retains the general control over the elevator and its approaches and expressly covenants that he will keep them in good condition, although the tenant and other tenants have the right to use it in common with the landlord. Olson v. Schultz (Minn.) 36 L. R. A. 790.

Master and Servant.

The manner of delivering messages to railroad employees is held, in Card v. Eddy (Mo.) 36 L. R. A. 806, not to constitute a part of the master's duty so as to make him liable for injuries to an employee by negligence of another who delivered the message intrusted to him by attaching it to a weight and throwing it from a moving train.

Nuisances.

An ordinance absolutely prohibiting a railroad company from inclosing its track in the platted portions of the city, and providing that such inclosure shall be a nuisance, was held, in Grossman v. Oakland (Or.) 36 L. R. A. 593, to be void, although the city charter confers power to prevent and restrain nuisances, and declare what shall constitute a nuisance.

Oil.

A state inspector of illuminating oil who brands it to indicate that he has approved it and that it bears the statutory test, when in fact it does not, is held, in Hatcher v. Dunn (Iowa) 36 L. R. A. 689, not to be liable for damages caused by the explosion of the oil if he used due care, and used instruments furnished and approved by the proper authorities, and especially if the explosion was due to a defective lamp rather than to the inferior grade of the oil.

Public Moneys.

A deposit of public moneys by a state treasurer in a legally constituted depository for public funds in compliance with the law is held, in Bartley v. Meserve (Neb.) 36 L. R. A. 746, to be in substance and legal effect a loan of the moneys so deposited, and he can deliver the funds to his successor without withdrawing the money and giving physical possession thereof.

Receivers.

An intervener in a street railway receivership claiming a preference over mortgage indebtedness for machinery supplied to such company is required in Central Trust Co. v. Clark (C. C. App. 8th C.) 81 Fed. Rep. 273, to do equity by allowing the mortgage bondholders to show that they were not benefited to the extent of the full value of the machinery supplied by reason of the failure to deliver the same within the contract period, notwithstanding a judgment obtained in a state court against the company for the full contract price, as, in order to obtain a preference, the intervener must himself go behind such judg-

ment and show the origin and nature of the demand on which it rests.

Street Railways.

An ordinance requiring proper and suitable fenders on the front of electric cars to prevent accident, and making it unlawful to operate them in the streets without such fenders, is held, in State, *ex rel.* Cape May, D. B. & S. P. R. Co., *v.* Cape May (N. J.) 36 L. R. A. 653, to be a valid exercise of the power to regulate the use of the streets. In another case of the same name on page 656, an ordinance regulating the speed of such cars is sustained, while a third case of the same name, on page 657, sustains an ordinance requiring such cars to come to a full stop before crossing intersecting streets.

The right of a street railway to run over a bridge built over a railroad at a highway crossing is sustained in Pennsylvania R. Co. *v.* Greensburg, J. & P. St. R. Co. (Pa.) 36 L. R. A. 839. It is held that the railroad company is not an abutting owner that can contest such use of the bridge.

Sunday.

The provision of the Ohio statute making it an offense to play or exhibit the game of base ball on Sunday, classing the game with gambling and the sale of intoxicating liquors, etc., is held void by the Cuyahoga common pleas court in State *v.* Powell, 4 Ohio N. P. 302, on the ground that the Sunday statute is "not enacted or enforced to compel the observance of that day as a day of religious worship, but . . . as a day of rest," and that the grouping of base ball with acts of immoral tendency in the section which prohibits it is not a proper exercise of the police power, although the court declines to say whether or not it thinks a constitutional statute might be enacted to prohibit base ball on that day.

Taxes.

A foreign corporation which is a special partner in a limited partnership within the state acting as sole agent for the corporation in this country is held, in People, *ex rel.* Badische Anilin & S. Fabrik, *v.* Roberts (N. Y.) 36 L. R. A. 756, to be doing business within the state for the purpose of a tax on capital stock employed in the state.

The exemption of the "college estate" from all taxes is held, in Brown University *v.* Granger (R. I.) 36 L. R. A. 847, to extend to real estate which constitutes a part of the endowment.

Telegraphs.

The right of a telephone company to require a telegraph company to place a telephone instrument in its office for use in receiving and transmitting messages on the ground that it has allowed another telephone company to have an instrument there for that purpose is denied, in People, *ex rel.* Cairo Teleph. Co., *v.* Western Union Teleg. Co. (Ill.) 36 L. R. A. 637, on the ground that the telegraph company cannot be compelled to receive oral messages and that by waiving its rights in that respect in favor of one company it is not compelled to do so in favor of another.

A contract limitation of sixty days within which a claim must be presented for damages or statutory penalties on account of the default of a telegraph company in respect of the transmission of a message is held, in Western Union Teleg. Co. *v.* Eubank (Ky.) 36 L. R. A. 711, to be unreasonable and contrary to public policy as well as in violation of the state Constitution.

New Books.

"Encyclopædia of the Laws of England." Edited by A. Wood Renton. Sweet & Maxwell, Ld., 3 Chancery Lane, London. American Agent, Boston Book Co., Boston. (Vols. 1–3 received.) $6 per vol.

"Competency and Rights of Witnesses and Parties in Interest under New York Code of Civil Procedure." By Russell Headley. Matthew Bender, Albany, N. Y. 1 Vol. $3.50.

"Mechanics' Lien Law of New York." By Edward L. Heydecker. Matthew Bender, Albany, N. Y. 1 Vol. $2.50.

"Fraudulent Conveyances and Creditors' Bills." By Frederick S. Waite. 3d ed. Baker, Voorhis & Co., New York. 1 Vol. $6.

"State Control of Trade and Commerce, by National or State Authority." By Albert Stickney. Baker, Voorhis & Co., New York. 1 Vol. $2.25.

"Supplement to Second Edition of Birdseye's Revised Statutes." Baker, Voorhis & Co., New York. 1 Vol. $5.

"Indiana Revised Statutes." Horner's Annotated Edition. E. B. Myers & Co., Chicago. 1 Vol. $5.

Recent Articles in Law Magazines and Reviews.

"Government by Injunction."—13 Law Quarterly Review, 347.

"The Mystery of Elizabeth Canning."—13 Law Quarterly Review, 368.

"The Law of Divorce in England and Germany."—13 Law Quarterly Review. 395.

"The Mahomedan Law of Wakf."—13 Law Quarterly Review, 383.

"Nuisances in Roman Law."—13 Law Quarterly Review, 387.

"The Married Woman Judgment Debtor."—13 Law Quarterly Review, 406.

"The Growth of the Debenture."—13 Law Quarterly Review, 418.

"The Status of British Companies in France."—13 Law Quarterly Review, 426.

"The Demand for a High Standard of Legal Culture and Education."—3 Western Reserve Law Journal, 109.

"Proof of the Corpus Delicti."—1 Law. Notes (Am.) 89.

"Lawmaking."—20 New Jersey Law Journal. 304.

"Mandamus against Corporations to Compel Duties to Individuals."—45 Central Law Journal, 278.

"Bills and Notes—Corporation—Signing by Officers—Personal Liability."—45 Central Law Journal, 283.

"Criminal Law in England."—6 Michigan Law Journal, 229.

"The Law's Delay."—6 Michigan Law Journal, 237.

"The Principles of the Law Relating to Corporate Liability for Acts of Promoters." (Parts II. and III.)—36 American Law Register and Review, N. S. 609.

"The Administration of Justice in Japan."—36 American Law Register and Review, N. S. 628.

The Humorous Side.

TEMPTATIONS ABOUNDING.—"Doubtless a moving train does offer a temptation to small boys, as does every moving vehicle," says the court in holding that a railroad company is not under the duty to warn small boys away from a street crossing at which they are in the habit of playing; and the court adds: "So, likewise, the windows of an untenanted house often induce the throwing of stones thereat, while a farmer's orchard surrounded by a rail fence is a strong temptation."

WISDOM UNREGARDED.—"If by reprimand or ridicule the bar could be cured of bad habits," says a well-known judge in a published opinion, "I would endeavor to supply my share of the medicine, but 'wisdom cries out in the streets and no man regards it.'"

READY PAY WANTED.—"Even Dr. Tanner might not be able to endure a fast so long as might be the time required to collect the accounts of dentists," says the opinion in another case holding that a dentist was justified in abandoning employment for default in paying his monthly salary, although the employer contended that it had ample resources "consisting largely of good accounts but to press collections would, or might, lose custom."

TESTAMENTARY ORTHOGRAPHY.—The will of a California woman gives to a "stepdaughter" a "Feather bead boilster," and also makes other gifts including a "Bead Room seat," a "Spring Bead," a "large Meeror," a "Casmere Shall," a "Black Lace mantell," and also some "little Jewlerey."

A Connecticut will making numerous gifts spells bequeath with variations, as "beqeath," "bequeth," "bequath," and "boquath." Among the gifts is one to "mi nefu Margaret," and another to "mi nefu Anne," while a provision is also made for "mi Ers."

HE MEANT "ON TO HIM."—"I was up to him," said a witness before Lord Mansfield in an examination described by the London "Law Notes." "Up to him," said his Lordship, "what do you mean by being up to him?" "Mean, my Lord, why I was down upon him." "Up to him and down upon him," said his Lordship, "what does this fellow mean?" "Why, I mean, my Lord," said the witness, "that as deep as he thought himself I stagged him." When his Lordship still insisted that he did not understand what was meant, the witness exclaimed, "Lord, what a flat you must be!" If he had only said "on to him" his Lordship would have "tumbled to him."

HIS INTEREST ENDED.—A recent opinion recites an affidavit to the effect that defendant E. died a short time before the appeal was taken, and says it is contended that he should have been served with notice of the appeal, but adds: "The appeal is from judgment in favor of H. and it is difficult to see how E. is interested in or would be affected by the appeal."

OUTCLASSED.—On the issue of fraud in a sale to a municipality by a private corporation, a court lately said: "It is a fact properly for the consideration of the jury that the less expert business capacity, skill, and experience may be with the municipal corporation."

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Lacey's Digest of Railway Decisions, 1875	$ 7.50	$ 1.00
Pingrey on Chattel Mortgages, 1891	$ 6.00	$ 3.00
Redfield on Railways, 5th ed., 2 vols., 1873	$12.00	$ 2.00
Sharswood & Budd's Leading Cases Real Property, 4 vols., 1882	$24.00	$6. 00
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